In all that I can find nothing to support the purchaser in the present case. The amount involved is not disproportionate. It is 10% of the purchase price which is the usual amount of the deposit in a contract for the sale of land. The purchaser knew he would lose it if he did not complete. There is no suggestion of any imposition or sharp practice or anything of the sort. In view of the purchaser's conduct it is difficult to see any ground on which it can be said that the vendor's action in retaining the money is unconscionable.

For these reasons I would allow the appeal with costs and order judgment to be entered for the appellants (that is the vendor) with costs. As regards the counterclaim, I do not propose to deal with it beyond saying that the claim for a declaration is now otiose and that in my opinion the vendor in the light of all that happened was not entitled to specific performance. It would appear that, at any rate up to the time of trial, he had not put it out of his power to perform his part in that he had not sold the land to another purchaser. Nevertheless he has from the beginning taken up the attitude that he was relying on his own legal rights and the purchaser's lack of equitable rights and in my view he should be held to that election.

Hill and Barakbah JJ.A. concurred.

Appeal allowed.

Solicitors: *Allen, Gledhill & Ball; Braddell & Ramani.*

LIEW HON NYUK & ORS. v. LEE NYEAN CHOONG & ORS.

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) March 11, 1963]

[Ipoh — F.M. Civil Appeal No. 40 of 1962]

Administration — Transferring properties to company by deceased before his death — Company directors being executors trustees and beneficiaries under deceased's will — Proceedings for distribution of estate — Statement of accounts — Correction of.

Practice and Procedure — Application under O.55 r.3 — Summons-in-chambers, by — Whether procedure adopted correct.

Prior to his death, the deceased transferred the greater part of his property to a company incorporated on 2nd September, 1946 and in which he was the principal shareholder. On the same day he made a will appointing the 1st, 2nd and 3rd respondents, who were directors of the company, executors and trustees of his will. All the appellants and the respondents are beneficiaries under the will, a portion of which forbade the trustees to be engaged in any business or businesses of their own so long as they were acting as executors and trustees and declared that they were entitled to a salary of $200 a month so long as they should act as executors and trustees.

In the course of administration large sums of money had to be found for various purposes and the executors defrayed so much of the expenses of administration as exceeded the income out of the company's funds. The payments so made were treated for book-keeping purposes as interest-free loans from the company. Several years later the present appellants commenced proceedings against the executors asking for distribution of the estate and for taking accounts of the administration. Appearance was entered and affidavits were filed by both parties which showed that one Mr. P was appointed to complete the collection, administration, and distribution of the assets. On July 28, 1961 the respondents filed a statement of accounts prepared by Mr. P which showed that on 30th June, 1961 the amount owed by the estate to the company in respect of advances was $157,156.57. On 9th May, 1962 the respondents took out a summons-in-chambers under Order 55 rule 3 asking for an order that they be at liberty to transfer certain immovable property to the company in full and final satisfaction of the liability of the estate to the company.

The respondents filed an affidavit exhibiting a valuation by an architect of the property as at $140,200. One of the appellants filed an affidavit in reply stating that P's figures did not represent the true state of any indebtedness between the estate and the company as the monevs advanced included remuneration to the executors which amounted to $51,000. The matter came before the learned judge who made the order as prayed. On appeal,

Held: (1) the matter should not have been disposed of in chambers but as its correctness had not been questioned at any time and as the point did not go to jurisdiction, it should not be taken on appeal;

(2) by acting as directors in the company, the executors have not engaged "in business of their own" in the sense intended by the testator and therefore they were entitled to their remuneration.

Cases referred to:—

(1) *Todd* v. *Moorhouse* L.R. 19 Eq. 69.
(2) *Peak* v. *Jones* [1914] 1 Ch. 742
(3) *In re Turcan* 58 L.J. Ch. 101.
(4) *Forrester* v. *Jones* [1899] W.N. 78.
(5) *Davis* v. *Galmoye* 39 Ch. D. 322.
(6) *Boyes* v. *Cook* 14 Ch. D. 53.

COURT OF APPEAL.

Lim Kean Chye for the appellants.

N. T. Rajah for the 1st, 2nd and 3rd respondents.

P. P. Dharmananda for the 4th and 5th respondents.

N. H. Chan for the 6th and 7th respondents.

Cur. Adv. Vult.

Thomson C.J.: This appeal arises out of the administration of the Estate of one Lee Kwee Foh who died at Ipoh on 17th June, 1953.

The deceased was a very wealthy man and from time to time prior to his death, apparently with a view to lessening the incidence of estate duty, he had transferred the greater part of his property to a company known as Lee Kwee Foh Limited which was incorporated on 2nd September, 1946, and which I shall call "the family company".

At the time of his death the deceased himself held 1,080 shares in the family company which became part of his estate and all the other shares were held by the various persons who are beneficiaries of the estate. We have not been informed as to the extent of the holding of each of these individuals, but counsel has told us that the shares are distributed among them in different proportions from those in which they benefit under the

will of the deceased. At the time of death the directors of the family company were Lee Nyean Choong, Lee Nyean Shin and Lee Nyean Fon, three sons of the deceased who are also the executors of his will. They had been appointed as directors by the deceased who had paid for their qualifying shares. A fourth director was one Lee Nyean Chong, another son of the deceased, who is not, however, an executor of the will although he is a beneficiary.

The deceased left a will which was executed on 2nd September, 1946, the date of the incorporation of the family company.

That will appointed the three sons of the deceased who have been mentioned as executors and in brief provided for the distribution of the estate after a period of five years among 3 named wives, 12 named sons including the executors and 2 grandsons of the deceased in varying proportions. It also provided for the payment of maintenance allowances and gratuities on religious festivals to the beneficiaries, for payment of allowances to the executors until distribution and for certain religious purposes. In due course the executors applied for probate which was granted on 1st March, 1954, and extracted on 25th April, 1956.

At the time of the death the value of the assets which became vested in the executors less liabilities was declared at $470,000. (The value for estate Duty purposes was considerably higher but that was by reason of gifts *inter vivos*). Practically all of the estate consisted of land and of shares in companies, the biggest single item being the 1,080 shares in the family company, which were valued at $180,000. The liquid assets were trifling, the actual cash in various bank accounts being about $6,500.

In the course of administration large sums of money had to be found. A funeral suitable to the actual social standing of the deceased in this world and his putative social standing in the next had to be provided and paid for. Estate duty of $166,000 had to be paid before probate could be obtained. Maintenance allowances and so forth in terms of the will had to be paid to the beneficiaries. Payments had to be made for the upkeep of property and for legal expenses. There was some money coming in, particularly the dividends on the 1,080 shares in the family company, but this was insufficient to meet the outgoings.

The executors dealt with this difficulty in a sensible way. The family company was making considerable profits and had ample funds and the executors who were also directors of the family company defrayed so much of the expenses of administration as exceeded the income out of the family company's funds. The payments so made were treated for book-keeping purposes as loans from the family company to the estate but it should be emphasized that there has never been any question of treating these loans as attracting interest. And it should be added that there was no reason why these advances should not have been treated as loans which would be in due course fall to be repaid (see *Todd* v. *Moorhouse* [1]; *Peak* v. *Jones* [2]).

The administration proceeded on these lines for some years without any attempt being made to distribute the estate and apparently to the satisfaction of all concerned.

On 23rd June, 1960, however, six of the beneficiaries, two widows and four sons whose combined shares in the estate amounted to 34 out of 102 commenced proceedings by way of originating summons (Originating Summons No: 175 of 1960) against the 3 executors asking for distribution of the estate and for taking accounts of the administration. Later four other beneficiaries, a widow, 2 sons and a grandson, were joined as respondents to the proceedings and they have in effect aligned themselves with the executors with whom their combined shares amount to 47 out of 102. Four of the beneficiaries named in the will, three sons and a grandson, whose shares amount to 19 out of 102 are not parties but are out of the jurisdiction, the three sons having been living in China continuously since before the death of the testator. The two remaining shares are to be expended by the executors for religious purposes.

The applicants in the originating summons are the appellants in the present appeal to which the respondents are the respondents to the originating summons. For the sake of clarity in discussing a matter that has become somewhat complicated I shall refer to these parties throughout this judgment as the appellants and the respondents.

Appearance was entered to the originating summons and affidavits were filed but though it was set down for hearing on several occasions it was on each occasion adjourned and has not yet been disposed of. I hasten to add that there is nothing to show that any party has been more responsible than any other for the delay.

In the course of the proceedings a number of affidavits of a somewhat acrimonious nature were filed which it is not necessary to consider at length. One point, however, calls for note. In an affidavit by the respondents dated 14th March, 1961, it is said that after some negotiation between first, the parties and then their solicitors it had been arranged for Mr. L.J. Peace, an accountant, to complete "the collection administration and distribution of the assets" and that Mr. Peace was "proceeding with the preparatory work in this connection". The reply of the appellants, in an affidavit dated 12th April, 1961, did not deny that there had been an "arrangement" of the sort described by the respondents but said that it was not an "agreement" but "merely a temporary arrangement with a view to winding up the estate without recourse to the Court". They went on: "However owing to the lack of co-operation and good faith on the part

of the respondents it has not been found possible for Mr. Peace to proceed as expeditiously or as effectually as hoped for".

Three points emerge here which will be seen to be relevant at a later stage. They are that all parties were satisfied at one time for the estate to be dealt with by Mr. Peace, that the solicitors on both sides were fully aware of the arrangement made with him and that the appellants do not question his impartiality or his professional ability.

The next step that calls for note is that on 24th July, 1961, the respondents filed accounts of the administration from the death of the deceased till 30th June, 1961, compiled by Mr. Peace from, in the first place, accounts prepared by another firm of accountants, Messrs. Kang and Cheah, and after 19th August, 1960, from books kept by himself. Then, on 28th July, the respondents filed a statement by Mr. Peace, based on the accounts he had prepared, which showed that at 30th June, 1961, the amount owed by the estate to the family company in respect of advances, the nature of which has already been described, was $157,156.57.

At this stage one would have expected the appellants to take some steps. They had been complaining for over a year that they wanted distribution. Now accounts of some sort had been prepared by an accountant whom they had been prepared to trust both personally and professionally. As far as can be seen he was in possession of all the relevant books and there was no material available *aliunde*. In the circumstances one would have expected the appellants either to attack the accounts filed or to accept them and press for an order in terms of their original application on the basis of them.

They did nothing, however, and the next step was taken by the respondents.

On 9th May, 1962, they took out a summons-in-chambers entitled to be under Order 55 rule 3 asking for an order that they be at liberty to transfer premises at No: 24 Tambun Road, Ipoh, Mining Lease No: 13284, a 2/3rd share in Mining Lease No: 11220 and 31 shares in Eastern Hotel (Cameron Highlands) Ltd., all of which properties formed part of the estate, to the family company in "full and final satisfaction" of the liability of the estate to the family company.

I pause here to observe that I have very grave doubts as to whether this form of procedure was correct, but its correctness has not been questioned at any time and as the point does not go to jurisdiction I do not think it should be taken now (see *In re Turcan* [3]).

To proceed, the summons was supported by a long affidavit by the executors. This set out the history of the estate and of the family company and of the relations between them which have already been briefly described. It then exhibited Mr. Peace's accounts which shewed that at 30th June, 1961, the indebtedness of the estate to the family company amounted to $157,156.57 but said that this sum contained a sum of $8,776.75 which could not be vouched for and therefore should be deducted, thus reducing the indebtedness to $148,379.82. They exhibited a valuation by an architect of the premises at No: 24 Tambun Road which valued these premises at $114,000, a report on the mining leases by a firm of consulting engineers which valued these leases at $20,000 and a letter from the secretary of the hotel company valuing the shares in that company at $200 each. On these valuations the combined value of the properties was thus $140,200. The affidavit continued that the deponents as executors had agreed with the family company that that company should accept the properties mentioned in settlement of the debt of the estate and that they considered that this was in the interest of the estate but that the agreement was subject to the approval of the Court. This condition was, of course, both prudent and necessary in view of their dual capacity as directors and executors and of the consideration that in their capacity as executors they were trustees and although the beneficiaries of the estate were also the only shareholders in the family company their proportionate shares in the estate and in the family company were not the same.

The only affidavit filed in reply was by Lee Nyean Hon, one of the appellants who when the proceedings commenced had been a minor represented by his mother but who had in the meantime come of age. This was very short. It contained a number of allegations of bad faith of a completely general nature against the executors but it did not attack the good faith of Mr. Peace nor did it question the values put upon the properties. It said, however, that Mr. Peace's figures did not represent the true state of any indebtedness between the estate and the family company on two grounds. The first of these was that out of the money advanced by the family company the executors had paid themselves remuneration as executors amounting to $51,000. The second was that for the years 1953, 1954 and 1955 Mr. Peace's figures differed substantially from these contained in accounts prepared by Messrs. Kang and Cheah, another firm of accountants, which were exhibited.

In reply the respondents filed three affidavits which are relevant here.

The first of these was by the executors. With regard to the question of remuneration they admitted that they had paid themselves but contended that on a true construction of the will of the deceased they were entitled to do so. With regard to Mr. Peace's accounts they said that the appellants had been dissatisfied with the accounts prepared by Messrs. Kang and Cheah for the years 1953, 1954 and 1955 and that by agreement of all the parties all the papers relating to the estate had been handed over to Mr. Peace.

They added that they were advised that there was no real contradiction between the accounts of Mr. Peace and those of Messrs. Kang and Cheah.

Then there were two other affidavits, one by Mr. Peace and the other by Miss Cheah Choo Hong, a chartered accountant and a partner in the firm of Messrs. Kang and Cheah. Briefly these explained that there was no contradiction between the accounts prepared by the two accountants and that certain discrepancies which appeared at first sight to exist were only apparent and not real.

No further affidavits were filed and no attempt was made by either to cross-examine any of the deponents on his affidavit and the position therefore was that the only question really in issue between the parties was whether the executors were entitled to pay themselves remuneration.

It may well be that the parties, and particularly the appellants, did not realise that that was the position. They have, however, been legally represented throughout and if the parties are content to leave a question to be decided on affidavit evidence, if they are not prepared to deny the contents of affidavits with which they do not agree or even to cross-examine the deponents, they must take the consequences.

In any event, that was the position when the matter came before Azmi J. He heard the matter in Chambers on 2nd August, 1962, and made an order as prayed in the summons. On 7th August on an application that he should adjourn the matter into Court he certified that he required no further argument and some time later he stated his reasons for his decision. The appellants then appealed against his decision of 2nd August and we heard the appeal at Ipoh on 21st November, 1962.

To my mind only two of the grounds of appeal call for serious consideration.

As regards the other grounds of appeal, it was said that the Judge was wrong in holding that the valuation of the properties to be transferred was a fair and reasonable one. There was, however, no evidence on which he could hold otherwise than he did and indeed the valuation of the respondents was not denied. Again, it was said that he should have ordered that the repayment of the debt, if any, to the family company "should await administration and the taking of accounts", whatever that may mean. But what the respondents were asking was leave to take a step in the administration which had to begin somewhere. Again it was said that he should have refused to make an order on the ground that all the beneficiaries were not before the Court. But all the beneficiaries within the jurisdiction were before the Court and in particular it is difficult to see how the three sons living in China could have been brought before the Court. Again, it was said that he should have considered the dual position of the three respondents who were both trustees and directors of the family company and that the debt, if any, to the family company was incurred after the death of the testator. But there is nothing to show that he did not consider these things. In any event the debt was not denied on the affidavits, all that was denied was one item of $51,000 and even a Judge could not be thought to have overlooked the fact that in the nature of things administration expenses and funeral expenses are usually incurred after the death of a testator. It was also urged that the Judge should have held that the application before him should have been made by way of writ but before us this point was abandoned.

The first of the two remaining grounds of appeal that calls for discussion is to the effect that the Judge "should have adjourned the application into open Court because the alleged debt was disputed".

Quite frankly my own view is that the matter should not have been disposed of in Chambers. I have already expressed doubt as to whether it should have ever been raised by way of a summons-in-chambers. No objection was raised on that score but if, when the summons came on for hearing, counsel for the appellants had asked for it to be adjourned into open Court it is difficult to suppose that his application would have been unsuccessful.

But that is not what happened. What did happen was this. When the matter came on for hearing Mr. Rayan who had been acting at all times and from the very beginning of the proceedings as solicitor for the appellants appeared as counsel for them and said nothing. Counsel for the respondents addressed the Judge, read the affidavits and stated the grounds on which he thought his clients should have the order for which they asked. When he had finished, but not before then, Mr. Rayan said the accounts "cannot be decided on affidavit but in open Court"; that the executors and the directors of the family company were the same persons and they were avoiding giving evidence in the witness box. He referred to the affidavit filed on behalf of his clients (Lee Nyean Hon dated 24th May, 1962). He then asked for an adjournment on the ground that a Mr. Seenivasagam who was "really" counsel for the appellants was engaged elsewhere. An adjournment was refused, Mr. Rayan having made no further attempt to address the Court, the Judge then made the order for which he was asked and which is the order appealed against.

Now, in the first place if Mr. Rayan did not intend to accept the decision of the Judge in Chambers as final his proper course was to ask at once to have the summons adjourned into Court for argument (see *Forrester* v. *Jones* [4]). Again, had he done so and had his request been granted, as it probably would have been, he would not have been able to get the executors into the witness box because an examination of the Court files shews that he had taken no steps to secure their attendance to be cross-examined. Moreover there was nothing to cross-examine about. As has been seen, the only question to be decided was whether by reason of having acted as directors of the family company the executors were disentitled to the remuneration given to them by the will and that was a question to be decided on a construction of the will itself. As regards Mr. Seenivasagam being engaged elsewhere one would have thought that if the questions involved were of such difficulty that Mr. Rayan felt unable to deal with them himself an application for an adjournment would have been made at the commencement of the hearing rather than at a time when, had it been successful, it would have involved Mr. Seenivasagam appearing later under the very great handicap of not having heard the argument of counsel for the respondents. In the circumstances it is difficult to resist the conclusion that for some reason after hearing counsel for the respondents Mr. Rayan wished for some delay. Having regard to that and to the consideration that the only question at issue at that stage was a question of construction I do not think that this Court should interfere on the procedural ground alone but should consider whether upon the merits of the case it should interfere with the judgment of Azmi J. (see *Davis* v. *Galmoye* [5]).

That brings me to the second ground of appeal that calls for consideration. It is that Mr. Peace's accounts did not set out the true state of indebtedness between the estate and the family company because the amounts charged to the estate included payment of remuneration under the will to the executors and that they were not entitled to such remuneration by reason of having at all material times been engaged in other work as directors of the family company.

This turns on the following portion of the will:—

"I forbid my trustees to be engaged in any business or businesses of their own, so long as they are acting in the office of executors and trustees of this my will, and I hereby declare that should any of them desire to do so he must forthwith retire from the office of executor and trustee of this my will, without forfeiting any other rights under this my will.

I declare that each of my trustees shall be entitled to draw from my estate a salary of $200 (Dollars two hundred) a month so long as he shall act in the office of executor and trustee of this my will."

Now, it is admitted that at all material times the executors have acted as directors of the family company. But in so doing were they engaged in "businesses of their own" in the sense these words were used by the testator? Here, no doubt, we must place ourselves in the much ornamented armchair of the testator at the time he made his will (see *Boyes* v. *Cook* [6]). But whether we seat ourselves there or in the less ornate seat of ordinary common sense, when we consider the whole history of the dealings of the deceased with his property, when we consider that the family company was incorporated and the will was made on one and the same day, when we consider that the shareholders of the family company and the beneficiaries under the will are all members of his family and that no others than the members of his family are either shareholders or beneficiaries it is impossible to think that when the deceased talked about his executors being "engaged in any business of their own" so as to deprive them of their offices as executors he could have even contemplated the possibility of these words including holding the directorships in the family company to which he himself had appointed them. And I think I should add, lest it be said I have overlooked the point, that at no time has there been any question raised as to the *quantum* of remuneration that has in fact been paid to the executors. What has been questioned has been their title to any remuneration at all, although somewhat curiously the appellants have at no time raised the point that if their contention is correct that by acting as directors of the family company the executors have engaged in business of their own then not only are they not entitled to any remuneration as executors but they can be removed from their offices as such.

For the foregoing reasons I would dismiss the present appeal.

As regards costs, the only possible order would seem to be that the costs of all parties be taxed as between solicitor and client and paid out of the estate. I would venture to suggest, however, that the parties have a look at the bills when they are taxed before embarking on further litigation for which I can see many opportunities if the parties do not see reason and make an effort to settle their differences.

Hill and **Barakbah JJ.A.** concurred.

Appeal dismissed.

Solicitors: *Lim Cheng Ean & Co.; Maxwell, Kenion, Cowdy & Jones; Dharmananda & Co.; Cheang, Lee & Ong.*